tioner's arbitration claims after months of arbitrating through and beyond the opt-out deadline constitutes surprise under FED.R.CIV.P. 60(b)(1); (3) respondents' representations to petitioner that the Class Action and the arbitration were "unrelated," "different," and had "nothing to do with" each other constituted fraud, misrepresentation or misconduct supporting relief under FED.R.CIV.P. 60(b)(3); and (4) respondents' inequitable conduct and the extreme prejudice petitioner will suffer if it is not permitted to opt out constitute "other reasons justifying relief from the operation of the judgment" under FED.R.CIV.P. 60(b)(6). (*See* Pet. App. 11a-22a). Petitioner also raised common law judicial and equitable estoppel grounds based on respondents' contradictory positions. (*Id.*).

In sum, petitioner's motion under FED.R.CIV.P. 60(b) did not challenge the district court's approval of the Class Action settlement or its determination that the settlement was fair. Nor did petitioner seek to file a late claim against the settlement proceeds or, in any other way, to disturb the underlying settlement. Petitioner sought only to opt out from the Class Action settlement based on respondents' agreement to arbitrate petitioner's claims in New Jersey and their affirmative conduct during the NJ Arbitration making it clear to petitioner the two proceedings were separate and unrelated.

The district court heard oral argument on petitioner's motion on March 17, 2004. Eight months later, on November 15, 2004, the district court denied the motion and issued an order denying the requested relief. (Pet. App. 7a-10a). After reciting findings of fact and conclusions of law directed only to petitioner, the order denied petitioner's motion for relief under FED.R.CIV.P. 60(b), thereby preventing petitioner from further prosecuting its claims in the NJ Arbitration.

On December 16, 2004, petitioner filed a timely notice appeal from the district court's November 15 Order. (Pet. App. 5a-6a). Petitioner's appeal was strictly limited to whether the district court abused its discretion in denying its

motion for relief under FED.R.CIV.P. 60(b). The Eleventh Circuit requested, *sua sponte*, that the parties brief the jurisdictional question: "[wh]ether a class member in a class action who did not object to the settlement, may appeal the district court's November 15, 2004 order denying the class member's motion for an enlargement of time to opt out of the class action settlement? *See Devlin v. Scardelletti*, 536 U.S. 1, 14, 122 S.Ct. 2005, 2113, 153 L.Ed.2d 27 (2002)."

On May 19, 2005, the Eleventh Circuit dismissed the appeal for lack of jurisdiction. In a one sentence, unpublished opinion, the court of appeals states that petitioner, "an unnamed, non-intervening class member, lacks standing to challenge the district court's November 15, 2004, order denying the Fed.R.Civ.P. 60(b) motion to enlarge the time to opt out of the class action settlement and denying the alternative motion for relief from the settlement judgment." To support this proposition, the court of appeals cited to just one case—*Reynolds v. Butts*, 312 F.3d 1247, 1250 (CA11 2002). By doing so, the Eleventh Circuit rewarded respondents' inequitable and improper conduct, leaving petitioner no recourse for redress of its claims in any forum.

This petition then followed.

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari should be granted for two fundamental reasons.

First, the decision below incorrectly and expansively applies this Court's decision in *Devlin* and the Eleventh Circuit's decision in *Reynolds* to all unnamed class members who have neither intervened nor objected in a class action even where that class member appeals a final order which is collateral to the class action judgment or decree. This overly expansive application of *Devlin* and *Reynolds* flatly ignores the limits of those holdings which only apply in cases where

the unnamed class member challenges the underlying class action settlement. This misconstruction and misapplication of established case law also conflicts with this Court's precedent that a party who moves for relief from a judgment pursuant to FED.R.CIV.P. 60(b) has standing to appeal the denial of its motion. Furthermore, the case law consistently and explicitly holds that a judgment denying a Rule 60(b) motion is a final, appealable judgment under 28 U.S.C. 1291, which is exactly what the November 15 Order from the district court below is.

Second, the decision below ignores the plain language of this Court's holding in *Devlin* by improperly extinguishing petitioner's ability to seek its only form of relief as a "party" to the final order under which it sought appellate review. This Court made it clear in *Devlin* that petitioner is a "party" for purposes of its motion to enlarge the time to opt out of the class action settlement under Rule 60(b) because the November 15 Order from which it appeals is collateral to the underlying settlement.

I. THE ELEVENTH CIRCUIT'S OVERLY EXPANSIVE CONSTRUCTION OF THE *DEVLIN* AND *REYNOLDS* CASES ESSENTIALLY ELIMINATES ALL RIGHTS TO APPEAL ORDERS DENYING MOTIONS MADE FOR RELIEF UNDER RULE 60(B)

The decisions in *Devlin* and *Reynolds* do not provide a proper basis to dismiss petitioner's appeal because those decisions only apply to cases where an unnamed class member is challenging the approval or fairness of the underlying class action settlement—something that petitioner is clearly not doing here. *See Devlin*, 536 U.S. at 3; *Reynolds*, 312 F.3d at 1249.

Indeed, the dispositive facts of these cases make each one completely distinguishable, and therefore, completely inapplicable to the present matter. In *Devlin*, the petitioner, an unnamed class member, "sought to appeal the approval of a

settlement." 536 U.S. at 3. This Court explained the limitation of its holding when it noted the difference between appealing from "approval of class action settlements" and the "right to appeal an action that finally disposes of one's rights" under 28 U.S.C. § 1291. *Id.* at 8-9, 14. This Court reasoned that "no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the right to appeal from an action that finally disposes of one's rights has a statutory basis." *Id.* (citing 28 U.S.C. 1291). In petitioner's case, the November 15 Order from which it appeals was final and dispositive in that absent reversal on appeal, petitioner has no right to pursue its claims in the NJ Arbitration or any other forum.

Similarly, in *Reynolds*, the petitioners filed an appeal to review the denial of their motion for contempt and the approval of the class action settlement. 312 F.3d at 1249. The court of appeals held that unnamed, non-intervening members of a class in multi-district litigation have no standing to enforce consent decrees. The court's holding was based on the inability of unnamed class members to represent the class in challenging a consent decree and the availability of other adequate procedures to protect their interests, including opting out of the class. *Id.* at 1250.

These circumstances are precisely what distinguishes *Devlin* and *Reynolds* from the facts surrounding petitioner's appeal in this case because here, petitioner is not appealing from the "approval of [the] class action settlement" or a consent decree. Rather, petitioner appeals from the final judgment of the district court disposing of petitioner's right to opt out of the Class Action settlement based on respondents' misconduct—i.e., an action that finally disposes of petitioner's rights and which affords a statutory right of appeal under 28 U.S.C. 1291. Furthermore, dismissal of petitioner's appeal has eliminated all other avenues of redress for its claims against respondents.

There is no question that petitioner had a right to opt out of the multi-district Class Action settlement, which was certified as a Rule 23(b)(3) class action. *See* FED.R.CIV.P. 23(b)(3). Because petitioner was, in effect, tricked by respondents' misconduct into believing that respondents regarded petitioner's claims to be beyond the ambit of the Class Action and thus unwittingly allowed the opt-out deadline to expire, petitioner's only way to exercise its right to opt out was to file a motion in the district court, pursuant to FED.R.CIV.P. 60(b), to enlarge the time to opt out or, in the alternative, for relief from—i.e., to be excluded from—the Class Action settlement.

Petitioner's Rule 60(b) motion does not challenge the underlying approval or fairness of the settlement. *See Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 263 n. 7 (1978) ("an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review"); *American Bankers Ins. Co. of Florida v. Northwestern Nat'l Ins. Co.*, 198 F.3d 1332, 1338 (CA11 1999) ("An appeal of a ruling on a Rule 60(b) motion . . . is narrow in scope, addressing only the propriety of the denial or grant of relief and does not raise issues in the underlying judgment for review"); 12 *Moore's Federal Practice* 60.68[3] n.10 (Matthew Bender 3d ed.) (collecting cases).

Moreover, it is firmly-established that a judgment denying a Rule 60(b) motion is a final, appealable judgment under 28 U.S.C. 1291. Case law on this point is legion. *See Stone v. I.N.S.*, 514 U.S. 386 (1995) (the denial of a Rule 60(b) motion "is appealable as a separate final order"); *Gonzalez v. Sec'y for Dept. of Corr.*, 366 F.3d 1253, 1299 (CA11 2004) (same); *Fiore v. Washington Cmty. Mental Health Ctr.*, 906 F.2d 229, 232-33 (CA1 1992); *Gulf Coast Fans, Inc. v. Midwest Elec. Imps.*, 740 F.2d 1499, 1507 (CA11 1984) ("The denial of a Rule 60(b) motion is, in itself, a final appealable order"); *Wilson v. Thompson*, 638 F.2d 801, 803 (CA5 1981) ("The district court's denial of appellant's Rule 60(b) motion

constitutes a final appealable order under 28 U.S.C. 1291"); 12 *Moore's Federal Practice*, 60.68[1] n.1 (Matthew Bender 3d ed.) (collecting cases). Petitoner has a statutory right to appeal the district court's denial of its Rule 60(b) motion pursuant to 28 U.S.C. § 1291.

Indeed, petitioner's statutory right to appeal the district court's denial of its Rule 60(b) opt-out motion is further solidified by the fact that, in every reported case where a Rule 60(b) motion similar to that which petitioner brought as an unnamed class member, the Court retained jurisdiction and heard the appeal. *See In re Vitamins Antitrust Class Actions*, 327 F.3d 1207 (CADC 2003); *In re Painewebber Ltd. P'ships Litig.*, 147 F.3d 132 (CA1 1998); *Grilli v. Metropolitan Life Insurance Company, Inc.*, 78 F.3d 1533 (CA11 1996); *Silber v. Mabon*, 18 F.3d 1449 (CA9 1994); *Williams v. Burlington Northern, Inc.*, 832 F.2d 100 (CA7 1987); *In re Int'l House of Pancakes Franchise Litig.*, 536 F.2d 261 (CA8 1976); *In re Diet Drugs Prod. Liab. Litig.*, 92 Fed.Appx. 890 (CA3 2004); *In re Copely Pharm., Inc.*, 132 F.3d 42 (CA10 1997).

In sum, *Devlin* and its progeny do not bar petitioner's appeal because petitioner is not challenging the underlying settlement or consent decree. As a matter of law, the district court's November 15 Order is a separate, appealable final judgment under 28 U.S.C. 1291, that disposes of petitioner's right to opt out of the class action settlement. It does not relate to the district court's approval of the Class Action settlement, its fairness or, for that matter, any other aspect of the settlement that affects the class as a whole. Simply put, petitioner has a statutory right, pursuant to 28 U.S.C. 1291, to appeal the district court's denial of its Rule 60(b) motion, which sought to opt out of the Class Action settlement after the opt out deadline had expired. Accordingly, this Court should grant the petition for writ of certiorari and hear petitioner's appeal.

II. THE ELEVENTH CIRCUIT'S DECISION REJECTS THE UNEQUIVOCAL AND CIRCUMSCRIBED HOLDING OF THIS COURT

The decision below ignores the plain language of this Court's precedents, including *Devlin*. Under this Court's precedents, the court of appeals had jurisdiction to hear petitioner's appeal from the November 15 Order because the plain language of *Devlin* classifies petitioner as a "party" for the purposes of this appeal and its motion to opt out of the class action settlement.

In fact, this Court noted in *Devlin* that "[n]onnamed class members * * * may be parties for some purposes and not for others. The label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." 536 U.S. at 9-10. In so noting, this Court held that unnamed class members are parties for purposes of appealing orders that are collateral to the underlying settlement and dispose of that party's rights. *See id.* at 7-9.

Specifically, this Court explained that it has "never * * * restricted the right to appeal to named parties to the litigation," and, in doing so, identified three precedents where it allowed unnamed parties to a litigation to appeal from orders that were separate from, and collateral to, the underlying judgment:

> In *Blossom v. Milwaukee & Chicago R. Co.*, 1 Wall. 655, 17 L.Ed. 673 (1864), we allowed a bidder for property at a foreclosure sale, who was not a named party in the foreclosure action, to appeal the refusal of a request he made during that action to compel the sale. In *Hinckley v. Gilman, C. & S.R. Co.*, 94 U.S. 467, 23 L.E. 166 (1877), we allowed a receiver, who was an officer of the court rather than a named party to the case, to appeal from an order "relat[ing] to the settlement of his accounts," reasoning that "[f]or this purpose he occupies

> the position of a party to the suit." *Id.* at 469. More recently we have affirmed that "[t]he right of a nonparty to appeal an adjudication of contempt cannot be questioned," *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988), given the binding nature of that adjudication upon the interested nonparty.

Devlin, 536 U.S. at 7. This Court held that the unnamed individuals in these three cases "*were parties* * * * in the sense that they were bound by the orders from which they were seeking to appeal." *Id.* at 9 (emphasis added). This Court then concluded that there was jurisdiction for the appellants in *Blossom*, *Hinckley* and *United States Catholic Conference* to appeal "that aspect of the District Court's order" that affected their respective interests. *Id.* There, as in petitioner's case here, the November 15 Order is particular to petitioner's interests and its appeal does impact any other class member's interest.

The essential elements of the case are, at bottom, simple and compelling. Petitioner appealed from the district court's collateral order denying Rule 60(b) relief, not the district court's order approving the Class Action settlement. The collateral order affected only petitioner's interests—i.e., its right to opt out of the Class Action settlement and its right to continue prosecuting its claims against respondents in the NJ Arbitration. Thus, for purposes of petitioner's motion, and for purposes of appealing the district court's denial of that motion, petitioner is a "party" with standing to appeal from the district court's denial of its Rule 60(b) motion. Petitioner's appeal should not have been dismissed for lack of jurisdiction, and this Court should grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, reverse the court of appeals' dismissal for lack of jurisdiction and order the court of appeals to proceed with a review of the merits of petitioner's appeal.

Respectfully submitted,

MARC C. SINGER *
GEOFFREY GAULKIN
ANTHONY DEL GUERCIO
BRYAN P. SCHROEDER
SAIBER SCHLESINGER SATZ
& GOLDSTEIN, L.L.C.
One Gateway Center
13th Floor
Newark, New Jersey 07102
(973) 622-3333

* Counsel of Record

August 17, 2005

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed May 19, 2005]

No. 04-16593-E

HEALTHPATH OF MERCER COUNTY, INC.,
Defendant-Appellant,

v.

AETNA U.S. HEALTHCARE, INC.,
AETNA HEALTH PLANS OF NEW JERSEY, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before ANDERSON, BIRCH, and BARKETT, *Circuit Judges.*

BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. Appellant, an unnamed, non-intervening class member, lacks standing to challenge the district court's November 15, 2004, order denying the Fed.R.Civ.P. 60(b) motion to enlarge the time to opt out of the class action settlement and denying the alternative motion for relief from the settlement judgment. *See Reynolds v. Butts*, 312 F.3d 1247, 1250 (11th Cir. 2002).

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, NW.
Atlanta, Georgia 30303

[Filed Jan. 14, 2005]

January 6, 2005

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 04-16591-EE
Case Style: HealthPath of Mercer County, Inc. v. Aetna Health Plans
District Court Number: 00-01334 MD-FAM

NOTICE OF APPEAL FILED: December 13, 2004

After review of the district court docket entries, order and/or judgment appealed from, and the notice of appeal, it appears that this court may lack jurisdiction over this appeal. If it is determined that this court is without jurisdiction this appeal will be dismissed.

The parties are requested to simultaneously advise the court in writing within fourteen (14) days from the date of this letter of their position regarding the jurisdictional question(s) set forth on the attached page. An original plus three copies of any response should be filed. The responses must include a Certificate of Interested Persons and Corporate Disclosure Statement as described in Fed.R.App.P. 26.1 and the corresponding circuit rules. Requests for extensions of time to file a response may not be entertained.

After fourteen (14) days, this court will consider any response(s) received and any portion of the record that may be required to resolve the jurisdictional issue(s). Please note that

the issuance of a jurisdictional question does *not* stay the time for filing appellant's briefs otherwise provided by 11th Cir. R. 31-1.

Sincerely,

/s/ Thomas K. Kahn
THOMAS K. KAHN, Clerk
Reply To: Brenda Wiegmann
(404) 335-6174

c: District Court Clerk

NO. 04-16593-E

JURISDICTIONAL QUESTION(S)

Whether a class member in a class action who did not object to the settlement, may appeal the district court's November 15, 2004, order denying the class member's motion for an enlargement of time to opt-out of the class action settlement? *See Devlin v. Scardelletti*, 536 U.S. 1, 14, 122 S.Ct. 2005, 2113, 153 L.Ed.2d 27 (2002).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MDL No.: 1334
Master File No.: 00-1334-MD- MORENO

In Re Managed Care Litigation
PROVIDER TRACK CASES

NOTICE OF APPEAL

Notice is hereby given that claimant Health Path of Mercer County, Inc. ("HIPA"), a putative class member in the above named case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment entered in this action on November 16, 2004 denying HIPA's motion for the enlargement of time to opt-out of the class action settlement with Aetna and/or for relief from judgment.

Respectfully submitted,

SAIBER SCHLESINGER SATZ
& GOLDSTEIN, LLC
Attorneys for Health Path
of Mercer County, Inc.

By: /s/ Jane W. Moscowitz
MARC C. SINGER (MS-1260)
ANTHONY DELGUERCIO
One Gateway Center, 13th Floor
Newark, New Jersey 07102-5311
(973) 622-3333

Dated: December 15, 2004

MOSCOWITZ MOSCOWITZ & MAGOLNICK, P.A.
Mellon Financial Center
1111 Brickell Avenue, Suite 2050
Miami, Florida 33331
(305) 379-8300
Jane W. Moscowitz
(Florida Bar No.: 586498)

/s/ Jane W. Moscowitz
JANE W. MOSCOWITZ

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

[Filed Nov. 15, 2004]

MDL No. 1334
Master File No. 00-1334-MD-MORENO

IN RE: MANAGED CARE LITIGATION

THIS DOCUMENT RELATES TO PROVIDER TRACK CASES

ORDER DENYING HIPA'S MOTION FOR ENLARGEMENT OF TIME TO OPT-OUT OF CLASS ACTION SETTLEMENT WITH AETNA

Before the Court is a motion for an enlargement of time to opt-out of the class action settlement achieved between physicians and Aetna, Inc. filed by Healthpath of Mercer County, Inc. For the reasons set forth below, the motion to opt-out is denied.

I. BACKGROUND

In a multi-district class action consolidated before this Court in early 2000, Defendant Aetna, Inc. ("Aetna") and Class Plaintiffs physicians achieved a settlement in mid-2003. As part of the settlement, class members were instructed that if they did not want to participate in the proposed settlement, they were required to submit a signed opt-out notice no later than August 29, 2003.

Concurrently, Healthpath of Mercer County, Inc. ("HIPA") was engaged in litigation in New Jersey with two subsidiaries of Aetna, Aetna U.S. Healthcare, Inc. ("AUSHC") and Aetna Health Plans of New Jersey, Inc. ("AHP"). Specifically, HIPA and the Aetna subsidiaries have been engaged in arbitration since June, 2000 pursuant, to an arbitration clause included in the contract between HIPA and AHP and AUSHC.

HIPA's president and agent for service of process under its IPA agreement was mailed notice of the settlement. In addition, summary notice was accomplished through publication in many of the nation's major national publications. Nine physicians associated with HIPA submitted signed opt-out notices prior to the opt-out deadline. Nearly five months after the opt-out deadline, HIPA filed the instant action for an enlargement of time to opt-out of the settlement on January 20, 2004.

II. ANALYSIS

In support of its motion, HIPA contends that AHP and AUSHC intentionally misrepresented that the claims and issues involved in the class action settlement were different and unrelated to the HIPA arbitration. First, HIPA contends Aetna is judicially estopped from opposing its motion to opt-out. Second, HIPA argues that the actions of AHP and AUSHC constitute extrinsic fraud and as a result, HIPA is entitled to relief under Fed. R. Civ. P. 60(b)(3). Last, HIPA contends that equity clearly indicates that the Court should grant HIPA relief from the opt-out deadline by invoking Fed. R. Civ. P. 60(b)(6).

A. Judicial Estoppel

The Court is unconvinced that representations by AHP and AUSHC in the New Jersey arbitration proceeding rise to the level of judicial estoppel. HIPA points to representations made with respect to HIPA's questioning of a witness regard-

ing Aetna's document retention policy. However, the line of questioning was principally targeted at the relationship between Aetna and its subsidiaries. When asked whether the document retention policy differs from department to department, the witness replied that the legal department had issued a number of e-mails in connection with the "class action lawsuits" and that the legal department was strict about the department's "hanging on to every piece of documentation." In response to follow-up questions, counsel for AHP and AUSHC asserted that the "e-mails have nothing to do with the lawsuit." Viewed in light of the context in which they were made, the representations do not appear to describe the two proceedings as different and unrelated.

In addition, HIPA alleges that during a hearing on a discovery dispute, counsel for AHP and AUSHC represented that the multi-district action and the arbitration proceedings are different and unrelated. Counsel stated that the document retention e-mail "related to a different piece of litigation." Here again, the Court considers the representation in the context in which it was made. In the context of a discovery dispute, the representation appears to relate to the relationship between the e-mail and the arbitration proceeding, not the relationship between the multi-district action and the arbitration proceeding.

B. Extrinsic Fraud

HIPA's second argument in support of its motion to opt-out is that the misrepresentations constitute extrinsic fraud and as a result, it is entitled to relief from the opt-out deadline. HIPA points the Courts attention to Fed. R. Civ. P. 60(b)(3) which allows a Court to provide relief from an order in cases of fraud or misrepresentation. However, as noted above, the Court is unconvinced AHP's and AUSHC's representations constitute intentional misrepresentations. As a result, the Court must decline HIPA's invitation to exercise Fed. R. Civ. P. 60(b)(3).

C. Fed. R. Civ. P. 60(b)(6)

Finally, with respect to Fed. R. Civ. P. 60(b)(6), HIPA contends it is entitled to relief from the opt-out deadline because it was intentionally misled by AHP and AUSHC and if the Court denies its motion to opt-out, it would leave HIPA with no adequate remedy for its arbitration claims. Fed. R. Civ. P. 60(b)(6) provides that a Court may grant relief from an order for "any other reason justifying relief from the operation of the judgment."

However, the Court notes that notice was accomplished both in the form of actual and summary notice to physician class members associated with HIPA, including HIPA's president and agent for service of process. More importantly, nine physicians associated with HIPA submitted signed opt-out notices prior to the opt-out deadline. At bottom, Aetna was obligated to notify class members, not counsel for class members.

III. CONCLUSION

After having considered the motion, the response, the reply, and the pertinent portions of the record, the Court concludes that HIPA's motion for an enlargement of time to opt-out of the class action settlement achieved among physicians and Aetna should be denied. Accordingly; it is

ADJUDGED that HIPA's Motion for Enlargement of Time to Opt-Out of Class Action Settlement (D.E. 2824), filed on January 20, 2004 is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of November, 2004.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed Jan. 20, 2004]

MDL NO.: 1334
Master File No.: 00-1334-MD—MORENO

In Re Managed Care Litigation
PROVIDER TRACK CASES

MOTION FOR ENLARGEMENT OF TIME TO OPT OUT OF CLASS ACTION SETTLEMENT WITH AETNA AND/OR FOR RELIEF FROM JUDGMENT

Healthpath of Mercer County, Inc. (hereinafter, "HIPA") submits this Motion for an enlargement of time to opt out of the class action settlement with Aetna and/or for relief from the settlement judgment in the above-captioned case. HIPA has filed a memorandum of law with this Motion to address the pertinent legal issues. In further support, HIPA avers as follows:

1. HIPA is an independent practice association ("IPA") and is a corporation organized under the laws of the State of New Jersey. Up until December 1997, HIPA had approximately 300 physician-members who were obligated to treat individuals enrolled in Aetna HMO plans in the Mercer County region of New Jersey.

2. Shortly after Aetna terminated that relationship in or about December 1997, HIPA ceased functioning as an active IPA in New Jersey.

3. On or about June 22, 2000, HIPA instituted an arbitration proceeding pursuant to Article IX (page 19) of its October 1, 1990 IPA Service Agreement with Aetna (attached as Exhibit A), entitled *Healthpath of Mercer County, Inc. v. Aetna Health Plans of New Jersey, Inc., et al.*, wherein HIPA sought damages against Aetna as a result of various breaches of that IPA Service Agreement. (The "HIPA Arbitration"). (A copy of HIPA's Demand for Arbitration is attached as Exhibit B).

4. Up until December 12, 2003, HIPA and Aetna were actively engaged in the HIPA Arbitration with both sides incurring *hundreds of thousands of dollars* in fees and costs associated with the litigation of the claims and defenses raised in the HIPA Arbitration.

5. On repeated occasions after Aetna signed the class action Settlement Agreement on May 21, 2003, Aetna affirmatively represented to HIPA that the above-captioned managed care class action litigation had absolutely "nothing to do with" the HIPA Arbitration.

6. Specifically, during a June 17, 2003 deposition of Aetna's Rule 30(b)(6) witness in the HIPA Arbitration, HIPA's counsel inquired about documents (e-mails) relating to document retention policies in class actions Aetna was involved in at the time. In response, Aetna's counsel, Tricia B. O'Reilly, Esq., interjected an objection and insisted that the class actions had "nothing to do with" the HIPA Arbitration. *See* June 17, 2003 Deposition Transcript of Kevin Thatch at 271:15-25 (attached as Exhibit C). Ms. O'Reilly explained that:

> I [Aetna's legal counsel] will represent these e-mails have nothing to do with this lawsuit [i.e., the HIPA Arbitration]. They were e-mails of a pretty recent time frame that have to do with various class action lawsuits that are pending around the country and they really have

nothing to do with this [arbitration]. Tr. 271:15-25 (Exh. B).

7. Later on in the June 17, 2003 deposition of Aetna's Rule 30(b)(6) witness, Aetna's counsel, Ms. O'Reilly, reiterated that position and affirmatively represented that the *issues* and *claims* in the HIPA Arbitration had "nothing to do with" the issues and claims in this class action. Aetna's legal counsel, Tricia B. O'Reilly, again insisted that:

> it has nothing to do with your [HIPA's] lawsuit, your time frame [1993-1994]. You're talking about documents back from '94. These are responses from Aetna in-house legal counsel to particular [class action] lawsuits that have been filed around the country having nothing to do with the claims and issues and types of claims and issues in this litigation [i.e., the HIPA Arbitration]. Tr. 272:8-14 (Exh. C).

8. Following the June 17, 2003 Rule 30(b)(6) deposition, HIPA's counsel continued to ask Aetna about e-mails that were produced by Aetna in the HIPA Arbitration that related to the class action. In a July 10, 2003 letter (attached as Exhibit D), Aetna responded to HIPA's inquiry about the class action as follows:

> Your request for an e-mail that was circulated by Aetna's General Counsel concerning various class actions pending across the country is a further attempt to harass Aetna. As Mr. Thatch [Aetna's FRCP 30(b)(6) witness] explained, this e-mail relates to a document retention policy pertaining to documents that may be relevant in a series of class action lawsuits unrelated to this action. Aetna will not produce this document. (Exh. D).

9. Aetna always maintained that claims and issues in this class action had "nothing to do with" the issues or claims

in the HIPA Arbitration,[1] despite the fact that critical events had already occurred in this class action.

10. Significantly, Aetna has actively participated in the arbitration proceeding from June 2000 through December 2003, including an extended period of approximately seven (7) months *after* Aetna signed the Settlement Agreement on or about May 21, 2003. (A copy of the May 21, 2003 Settlement Agreement in this class action is attached as Exhibit F). As set forth below, Aetna actively participated in discovery, depositions, motion practice and, significantly, it was Aetna who submitted a new Scheduling Order to the arbitration in the arbitration proceeding in October 2003 that proposed discovery end dates and a proposal for hearing dates to be scheduled in March 2004.

11. In a letter, dated June 19, 2003, approximately four (4) weeks after the class action Settlement Agreement was signed by Aetna, Aetna confirmed deposition dates of HIPA representatives that were previously scheduled for the end of June 2003, and also demanded that HIPA produce additional documents to aid in Aetna's preparation for those depositions. (A copy of Aetna's June 19, 2003 letter is attached as Exhibit G)

12. On July 23, 2003, two months after the class action Settlement Agreement was signed by Aetna, Aetna served subpoenas on HIPA's arbitration consultant and another third-party in connection with the arbitration proceeding.

---

[1] As it turns out, a comparison of the pleadings in the class action litigation and claims asserted by HIPA in its Demand for Arbitration reveal that Aetna's representations are false, and that the claims and issues asserted in the class action and the HIPA Arbitration are similar. (A copy of the Provider Plaintiffs' Second Amended Complaint in this class action is attached as Exhibit E; *see also*, Exh. B, HIPA's Demand for Arbitration).

(A copy of Aetna's subpoenas (without exhibits) are collectively attached as Exhibit H).

13. On August 13, 2003, almost three months after the class action Settlement Agreement was signed by Aetna, and approximately two weeks before the opt-out deadline, Aetna filed an extensive Memorandum in Opposition to HIPA's Motion to Compel Discovery and for Sanctions and a Cross-Motion for Sanctions, dealing directly with issues of discovery in the HIPA Arbitration, which Aetna maintained was critical to its defense of the claims in the HIPA Arbitration. (A copy of the August 13, 2003 cover letter and a copy of the cover page of Aetna's Memorandum of Law are collectively attached as Exhibit I).

14. On August 29, 2003—the same day as the opt-out deadline, Aetna filed a Reply Brief in further support of its Cross Motion in the arbitration proceedings. (Copies of the August 29, 2003 cover letter and a copy of the cover page of Reply Memorandum of Law are collectively attached as Exhibit I).

15. On September 3, 2003—*four days after the opt-out deadline* and almost three and a half months after Aetna signed the class action Settlement Agreement, Aetna participated in a hearing before the arbitrator to resolve the outstanding motions and discovery issues. (A copy of the hearing transcript is attached as Exhibit K).

16. During the September 3, 2003 hearing, Aetna never once mentioned that HIPA's claims were the subject of a class action. Instead, Aetna's counsel reiterated to both HIPA and the arbitrator that any pending class action proceedings were "different" from the HIPA Arbitration. (*See* Exh. K, Hr'g Tr. at 21:20-25).

17. Thereafter, by letter dated September 19, 2003—approximately four months after Aetna signed the Settlement Agreement—Aetna proposed that a new scheduling order

be submitted to the arbitrator in the arbitration proceeding in order that the parties have adequate time to complete fact and expert discovery so that the claims and issues could be arbitrated. (A copy of Aetna's September 19, 2003 letter is attached as Exhibit L).

18. In a letter dated October 7, 2003, approximately four and a half months after Aetna signed the Settlement Agreement, Aetna demanded that HIPA provide a detailed explanation in connection with documents Aetna claimed HIPA failed to produce in discovery in the arbitration proceeding, including specific details as to (1) the location of where the documents would be; (2) efforts made by HIPA to locate the documents; and (3) the chain of custody of the documents. (A copy of Aetna's October 7, 2003 letter is attached as Exhibit M).

19. In a second October 7, 2003 letter, Aetna filed a motion to quash subpoenas issued by HIPA to Aetna's document storage facilities. (A copy of Aetna's second October 7, 2003 letter is attached as Exhibit N).

20. On October 24, 2003—*the same day* that this Court entered the Final Approval Order for the class action settlement, *Aetna submitted a Proposed Scheduling Order to the arbitrator in connection with the arbitration* that set forth discovery deadlines, expert report and deposition deadlines, and an end date (March 1, 2004) by which the parties would agree to hearing dates. (A copy of this Court's Final Approval Order is attached as Exhibit O and copies of the Scheduling Order and cover letter submitted by Aetna to the arbitrator in the arbitration are collectively attached as Exhibit P).

21. By letter dated November 24, 2003—one month *after* this Court entered the Final Approval Order for the class action settlement and two and a half weeks *after* this Court entered the Supplemental Final Approval Order,

Aetna confirmed with HIPA a December 9, 2003 deposition date for one of Aetna's witnesses in the arbitration, and asked HIPA to schedule two deposition dates for two of HIPA's witnesses "for the second week of January (January 5-9, 2004)."[2] (A copy of this Court's Supplemental Final Approval Order is attached as Exhibit Q, and a copy of Aetna's November 24, 2003 letter in the arbitration is attached as Exhibit R).

22. In a multi-page, detailed letter, dated December 3, 2003, Aetna raised purported deficiencies with HIPA's document production in the arbitration proceeding and demanded that HIPA resolve its alleged document production deficiencies. (A copy of Aetna's December 3, 2003 letter is attached as Exhibit S).

23. In a second letter from Aetna, also dated December 3, 2003, Aetna again claimed that "document discovery is not yet complete." (A copy of Aetna's second December 3, 2003 letter is attached as Exhibit T). Aetna further suggested rescheduling the deposition of Aetna's witness, Cindy Mazer (previously scheduled for December 9, 2003), until after the close of document discovery. (*See* Exhibit T). Aetna then represented that "[a]t that time, we [Aetna] will set firm dates for all witnesses so that deposition discovery can proceed expeditiously and in accordance with Judge Politan's [Scheduling] Order," which was the October 24, 2003 Scheduling Order submitted to the arbitrator by Aetna. *See* Exhibit T; *see also* Exhibit P, Scheduling Order).

24. In a December 4, 2003 telephone conversation with Aetna's attorney, HIPA's counsel agreed to conclude

---

[2] As set forth, *infra*, Paragraph 24, Aetna filed its application to stay/dismiss the arbitration proceeding on December 12, 2003 notwithstanding the fact that Aetna asked HIPA just two weeks earlier to schedule depositions "for the second week in January (January 5-9, 2004)."

written discovery and proceed with the deposition of one of Aetna's witnesses on December 9, 2003. By letter dated December 4, 2003—one month after this Court entered the Supplemental Final Approval Order for settlement in the class action—Aetna's counsel confirmed this December 4, 2003 telephone conversation with HIPA's counsel and agreed to go forward with the deposition of Aetna's witness on December 9, 2003, but insisted that Aetna still wanted more discovery from HIPA. (A copy of Aetna's December 4, 2003 letter is attached as Exhibit U).

25. By letter dated December 5, 2003, Aetna again confirmed that "Aetna does not consider the document discovery [in the HIPA Arbitration proceeding) complete." (A copy of Aetna's December 5, 2003 letter is attached as Exhibit V).

26. A week later, by letter dated December 12, 2003—almost *six months after* the class action Settlement Agreement was signed by Aetna, *after* the August 29, 2003 opt-out deadline had passed, and *after* the September 30, 2003 deadline for HIPA to file a claim against the Settlement proceeds had passed—Aetna abruptly sought to pull the plug on the HIPA Arbitration by filing an application with the arbitrator to stay/dismiss the HIPA Arbitration pending this Court's dismissal of the arbitration. (A copy of Aetna's December 12, 2003 application (without exhibits) is attached as Exhibit W).

27. In Aetna's December 12, 2003 application in the HIPA Arbitration, and contrary to its prior representations to HIPA (and the arbitrator), Aetna argued, for the first time, that HIPA's arbitration claims are subject to the class action settlement.

28. Until Aetna's December 12, 2003 letter to the arbitrator, Aetna always maintained and represented that

this class action had "nothing to do with" the HIPA Arbitration.

29. Aetna and HIPA, collectively, have incurred hundreds of thousands of dollars in fees and costs over the past three and a half years in connection with the HIPA Arbitration.

30. HIPA and Aetna continued to actively arbitrate for many months after the class action settlement date, opt-out deadline and claim deadline. In so doing, Aetna caused HIPA to incur substantial additional arbitration costs, legal fees and expert fees well after the class action settlement date and the opt-out and claim deadlines.

31. HIPA submits that its failure to opt-out of the settlement was the result of Aetna's repeated representations that the class action "had nothing to do with" the HIPA Arbitration, coupled with Aetna's active participation in the arbitration through the class certification, the date of the Settlement Agreement, the opt-out and claim deadlines, and beyond the dates on which this Court entered the Final Approval Order and Judgment of settlement on October 24, 2003 and the Supplemental Final Approval Order, dated November 6, 2003.

32. HIPA also submits that its failure to opt-out was not a strategic decision[3], but was the result of HIPA's good

---

[3] Indeed, HIPA's legal counsel did not receive notice of the class action settlement and, to the best of HIPA President, Dr. William B. Caskey's recollection, he does not recall receiving notice of the class action settlement in the mail. (*See* Affidavit of William B. Caskey at ¶ 4). Nonetheless, as set forth in Dr. Caskey's affidavit submitted herewith, even if he did receive notice, HIPA always believed that it was contractually required to arbitrate its claims against Aetna, and that HIPA and Aetna were actively engaged in that arbitration process for the past several years, and that HIPA's arbitration claims had nothing to do with the class action. (*Id.* at § 3-5).

faith reliance on the arbitration provision contained in the IPA Service Agreement, Aetna's active participation in the arbitration proceeding far the past three and a half years—including six (6) months after the Settlement Agreement was singed by Aetna—and the repeated representations made by Aetna's legal counsel, who insisted, on several occasions, that the class action had "nothing to do with" the HIPA Arbitration.

33. Because Aetna always affirmatively maintained that the HIPA Arbitration had "nothing to do with" the class action, and the fact that both HIPA and Aetna incurred substantial costs in trying to bring the arbitration to a resolution on the merits after three and a half years, Aetna is estopped from now changing its position. Further, Aetna will not be prejudiced by this Court granting HIPA's application to enlarge the time for HIPA to opt out of the class action settlement and to compel Aetna to proceed with that arbitration because such relief will merely allow the parties to continue and complete the arbitration proceeding they have been litigating for the past three and a half years.

34. Moreover, none of the class members will be prejudiced because by allowing HIPA to opt-out, HIPA will not seek any recovery from the class action settlement fund, thereby leaving more funds available to compensate the class members.

35. Allowing HIPA to opt-out of the class action settlement beyond the settlement date will simply have no significant impact on the class action settlement, nor on Aetna's reasonable expectations upon entering into that settlement agreement because it is clear that Aetna understood and intended to arbitrate HIPA's arbitration claims in the New Jersey arbitration proceeding.

36. Denying HIPA the ability to opt-out of the class action would, however, irreparably harm HIPA as it would leave HIPA without a forum to adjudicate the merits of its claims.

37. Accordingly, HIPA respectfully submits that it has demonstrated good cause for its failure to opt-out of the class action settlement prior to the August 29, 2003 deadline, and requests that its motion for enlargement of time to opt out of the class action settlement and/or for relief from judgment be granted and that HIPA be permitted to continue prosecuting its claims against Aetna in the HIPA Arbitration.

38. HIPA further respectfully requests that Aetna be equitably estopped from denying that the HIPA Arbitration "has nothing to do with" the class action and, therefore, be equitably estopped from denying that HIPA is not bound by the class action settlement because of Aetna's misrepresentations to that effect as well as Aetna's active participation in the arbitration for the last three and a half years—which includes seven (7) months after the class action settlement was reached in May 2003.

39. A proposed Order granting this motion is attached.

40. Counsel for HIPA has discussed the issues set forth in this Motion with Counsel for Aetna (Connell Foley, LLP) and has requested that Aetna withdraw its motion to stay/dismiss in the HIPA Arbitration, concede that the HIPA Arbitration has "nothing to do with" this class action, and proceed with the HIPA Arbitration. Counsel for Aetna refused to cooperate.

WHEREFORE, HIPA respectfully requests that the Court grant its request for an enlargement of time within which to opt out of the Settlement with Aetna in this case, and/or grant relief to HIPA from the settlement judgment, allowing HIPA and Aetna to proceed with the HIPA arbitration.

Respectfully submitted,

MOSCOWITZ MOSCOWITZ &
MAGOLNICK, PA

By: Jane W. Moscowitz
JANE W. MOSCOWITZ

Mellon Financial Center
111 Brickell Avenue, Suite 2050
Miami, Florida 33131
(305) 379-8300

MARC C. SINGER, ESQ.
ANTHONY DEL GUERCIO, ESQ.
SAIBER SCHLESINGER SATZ
& GOLDSTEIN, L.L.C.
One Gateway Center, 13th Floor
Newark, New Jersey 07102
(973) 622-3333

Attorneys for Healthpath of
Mercer County, Inc.

APPENDIX F

EXHIBIT C

[219]

IN THE MATTER OF
THE ARBITRATION BETWEEN:

HEALTHPATH OF MERCER COUNTY, INC.
Claimant,

vs.

AETNA/U.S. HEALTHCARE, INC. and AETNA HEALTH PLANS OF NEW JERSEY, INC.,
Respondents.

DEPOSITION UPON ORAL EXAMINATION
OF KEVIN THATCH
(VOLUME II)

TRANSCRIPT of the deposition of KEVIN THATCH, before ANDREA NOCKS, a Certified Shorthand Reporter, Certified Realtime Reporter and Notary Public of the State of New Jersey, at the offices of Connell, Foley, LLP, 85 Livingston Avenue, Roseland, New Jersey, on Tuesday, June 17, 2003, commencing at 10:05 a.m.

[220] APPEARANCES:

SAIBER, SCHLESINGER, SATZ & GOLDSTEIN, LLC
One Gateway Center
13th Floor
Newark, New Jersey 07102
BY: MARC C. SINGER, ESQ.
Attorneys for Claimant

CONNELL, FOLEY, LLP
85 Livingston Avenue
Roseland, New Jersey 07068
BY: TRICIA BEVELOCK. O'REILLY, ESQ
Attorneys for Respondents

[221] INDEX

WITNESS	DIRECT
KEVIN THATCH	
By Mr. Singer	222

EXHIBITS

NUMBER	DESCRIPTION	IDENTIFICATION
H-16	Membership report as of December 1993	222
H-17	Field Office Administration Manual, September 1994	277
H-18	Aetna/U.S. Healthcare Core Customer Service Policies and Procedures, April 9, 1999	277
H-19	Aetna/U.S. Healthcare Core Customer Service Policies and Procedures, April 15, 1999	277
H-20	Aetna/U.S. Healthcare Core Claim Policies and Procedures, issued date of April 25, 2000, effective date of June 1, 2000	277

H-21	Aetna/U.S. Healthcare Core Claim Policies and Procedures, issued date of November 9, 2000 effective date of October 10, 2000, audit effective date of December 15, 2000	277
H-22	June 1, 2000 memorandum	277
H-23	December 16, 1997 letter	329
H-24	January 7, 1998 letter	330
H-25	IPA Service Agreement by and between Aetna Health Plans of New Jersey and Healthpath of Mercer County, Inc.	333
H-26	September 24, 1991 letter	356
H-27	Aetna Health Plans-Managed Care System, Banner	357
H-28	Documents	361
H-29	November 16, 1993 document	375

[222] (Document is marked as H-16 for Identification.)

KEVIN THATCH, 484 Glenn Rose Circle, King of Prussia, Pennsylvania, called as a witness, having been first duly sworn according to law, testifies as follows:

DIRECT EXAMINATION BY MR. SINGER:

Q Good morning, Mr, Thatch.
A Good morning.
Q You're here again hopefully for the last time.
A Volume two.
Q Volume two. Right.

Now, at the time that you prepared this Affidavit which is December 16, 2002, what was your understanding of what documents would be kept for three years or stored for three years versus what documents would be stored for 15 years?

A I didn't have a real specific understanding by type of document. Pretty much the range, I came up with that range by analyzing various inventory reports where it would have dates of destruction and I would see some would be three years out and some would be ten, up to 15 years out.

Q Okay.

A Just to provide some time frame.

Q Are you able to tell me today what sorts of documents might be kept for only three years versus those that would be kept up to 15 years?

[267] A No. Not offhand.

Q To your knowledge, would work papers generated by Aetna which relate to capitation rates be documents that would be kept in storage by Aetna?

MS. O'REILLY: Objection to form and foundation.

A To my knowledge, that type of information would be stored both onsite and offsite.

Q And to your knowledge, if, for example, work papers relating to capitation rates were prepared, let's say, in 1993, do you have any knowledge as to how long those documents would be stored?

A No, I don't.

MS. O'REILLY: Objection to form and use of the word work papers.

BY MR. SINGER:

Q Do you understand what work papers are?

A It varies, definitions of work papers. Why don't you tell me.

Q Sure.

When I refer to work papers. I'm referring to the underlying papers that were used in the example I gave relating to capitation rates, the underlying papers that were used to come up with and [268] calculate the capitation rates that were ultimately used. So it may be handwritten notes, things of that nature that would show the backup information that ultimately became the final capitation rate. Does that explain it any better?

MS. O'REILLY; I have a foundation objection.

MR. SINGER: Okay.

A That explains what work papers are.
Q Okay.
A You know, what types of specific work papers related to these cases, you know.
Q Okay. If there were work papers as I've defined that related to the calculation of capitation rates and if those work papers existed, let's say, in 1993, what would Aetna's policy have been with regard to how long they would maintain those documents before they would be destroyed?
A I really think it depends on the department who handles these documents, how long they would store those documents.
Q Okay. Were you ever involved in preparing work papers as I've defined it relating to capitation rates?
A Not specific to backup related to [269] developing capitation rates.
Q Okay. Just going back to paragraph 15 of your Affidavit, sorry to jump around, but you see where paragraph 15 refers to, towards the end, review of 78 boxes of Aetna's archive documents that had capitation as part of the description of the contents of the box?
A Yes.

Q To your knowledge, do you know the dates when those particular documents were archived?

A No, I don't. I don't have the specific information offhand.

Q Would that information have been contained in a list of some sort that was prepared relating to these 78 boxes?

A To my knowledge, you know, any list that would involve, you know, an Iron Mountain type of storage list would include the date that the information is originally archived.

Q Do you know what the document retention policy was with regard to those archive documents in terms of how long those documents were to be -maintained in storage?

MS. O'REILLY: Objection to form. Can you clarify when you use those documents, what [270] documents you're talking about.

MR. SINGER: I'm sorry, the ones referred to in paragraph 15 as the archive documents that had capitation as part of the description of the contents of the box.

MS. O'REILLY: The 78 boxes.

MR. SINGER: The 78 boxes.

A In that I have no idea, just by the word capitation, which department those boxes would have been handled by. I could not answer that question.

Q So as of today, do you know whether Aetna has a document retention policy that differs based upon department or is it standard throughout the entire organization?

A Today, to my knowledge, there's been e-mail communications basically due to class action lawsuits that have happened a few years ago to hang on to every piece of document. As far as specific document retention policies, the ones that I've been able to get

my hands on are specific to departments. You know, I can't necessarily point to one that encompasses in a policy format the entire company, but I can say that e-mail communication from Aetna's legal department have come down pretty much being [271] strict on hanging on every piece of documentation.

Q Okay. And those e-mails were in response to litigation?
A Yes.
Q Okay. And so I understand it, the e-mails were directed to whom at Aetna?
A Aetna, all employees.
Q And these were e-mails that were sent by whom?
A Aetna legal.
Q Aetna's in-house legal?
A In-house legal.
Q And you've seen these e-mails?
A Yes.

MS. O'REILLY: You know what, I'm going to—you can make a motion on this. I'm going to—I will represent these e-mails have nothing to do with this lawsuit. They were e-mails of a pretty recent time frame that have to do with various class action lawsuits that are pending around the country and they really have nothing to do with this. They're not relevant to the relevant time frame. So if you want to make a motion or bring that to Judge Polita. I don't want to go further down this road. There's some attorney client privilege stuff.

[272] MR. SINGER: What I want to know is whether these e-mails relate to an overall document retention policy on the part of Aetna; in other words, were these e-mails directed to any and all documents in the possession of Aetna regardless of whether it relates to a class action that may be venued in Florida or California or whereever.

MS. O'REILLY: But it has nothing to do with your lawsuit, your time frame. You're talking about documents back from '94. These are responses from Aetna in-house legal to

particular lawsuits that have been filed around the country having nothing to do with the claims and issues and types of claims and issues in this litigation.

MR. SINGER: I wouldn't know that cause I haven't seen the documents. That's why I'm asking the questions.

MS. O'REILLY: You know, I would suggest if you want to see the documents, you want to find out more about the documents, why don't we let Judge Politan review them in camera and if he says you can have them, you can have them.

MR. SINGER: Before I make that application, I'd like to get a little foundation to understand whether or not these documents, these [273] e-mail communications, relate to an overall document retention policy on behalf of Aetna or whether they were specific to litigation; in other words, what I'm trying to get at is when an e-mail would come in and say, whether it would say keep all documents that relate to litigation X or does it say keep all documents that relate to membership or something like that.

If you can explain to me what these documents relate to, I may not need to make such an application, but as far as I'm concerned, if Aetna's counsel or anyone at Aetna is sending around documents, e-mails, that are saying you better hold on to information or data that's within Aetna's possession and this is our policy throughout the entire organization, whether or not there's one class action, 50 class actions, if it impacts my case, and any documents are covered that would arguably be relevant or likely lead to relevant evidence in this case, then I'm entitled to see those and I'm trying to get at that information.

MS. O'REILLY: Well, bring it to Judge Politan. I'll leave it at that. You can make your application.

Can you answer the question, were the [274] e-mails that you received from the legal team relevant to particular, a

Exhibit D

CONNELL FOLEY LLP
ATTORNEYS AT LAW
85 Livingston Avenue
Roseland, N.J. 07068-3702
(973) 535-0500
FAX: (973) 535-9217

Jersey City Office
6 Chapel Avenue
Jersey City, N.J. 07305
(201) 521-1000
FAX: (201) 521-0100

New York Office
888 Seventh Avenue
New York, N.Y. 10106
(212) 262-2390
FAX: (212) 262-3118

July 10, 2003

Via Facsimile/Regular Mail

Marc C. Singer, Esq.
Saiber, Schlesinger, Satz & Goldstein, LLC
Gateway One
Newark, New Jersey 07102

RE: Healthpath of Mercer County, Inc. v. Aetna U.S. Healthcare, Inc. and Aetna Health Plans of New Jersey, Inc.

Dear Marc:

I am in receipt of your letter dated June 24, 2003 in which you claim, among other things, that Aetna: (1) failed to produce its document retention policies; (2) improperly redacted membership documents, and (3) is withholding risk pool reconciliations and capitation summaries. We strongly

disagree with each of your gross mischaracterizations of both Mr. Thatch's testimony and the status of Aetna's document production in this matter. Indeed, as discussed at more length below, it is HIPA's document production, not Aetna's, that is grossly deficient.

1. *Aetna Produced All Relevant Documents Relating To Document Retention Policies*

First, your commentary on the preparedness of Mr. Thatch is gratuitous, Mr. Thatch is our witness and we will prepare him in any way we deem appropriate. You are an adversary representing HIPA and thus, you have no say in how we chose to prepare our witness, Mr. Thatch.

Second, and notwithstanding the first point, contrary to your assertions, Kevin Thatch was very well prepared for this deposition and testified at length as "to matters known *or reasonably available* to the organization", *see* R. 4:14-4, in connection with all *relevant* issues in this matter. Mr. Thatch is the person that is most knowledgeable of the monumental efforts Aetna undertook to locate and produce responsive documents. Those efforts were set forth in great detail in his Affidavit and explored in depth at his deposition. Indeed, his efforts and those of other Aetna employees have been very fruitful, as Aetna has produced approximately 20,000 pages of documents responsive to HIPA's discovery requests. Indeed, aside from the voluminous production of business records relating to HIPA and the claims in this matter, through Mr. Thatch's efforts Aetna was able to locate and produce five of its document retention policies dating to as far back as September 1994. Aetna also provided a memorandum from Iron Mountain, Aetna's document storage facility, relating to Aetna's document destruction policy. These policies speak for themselves. As for your complaints as to the preparedness of Mr. Thatch on the issue of document retention policies, we point out that Aetna is only required to produce an individual able to "testify as to the matters known

or reasonably available to" Aetna. R. 4:14-2. Mr. Thatch was the appropriate deponent as he headed the effort to locate and produce responsive documents and because he is one of the few Aetna employees who worked in the relevant business group back in the early 1990s who is stilled employed by Aetna. Thus, Mr. Thatch has the most knowledge as to where documents relating to HIPA may be located. Aetna vehemently objects to HIPA's position that Aetna was required to produce individuals from across the company to testify to various broad document retention policies where there has been absolutely no evidence that any documents whatsoever were destroyed, be it pursuant to a document retention policy or otherwise, relating to HIPA and the claims in this litigation.

Third, we object to your requests set forth in the five enumerated paragraphs (misnumbered as six categories) for documents you identified as "document retention policies". We have general objections and specific objections to these requests.

A. *Aetna's General Objections To HIPA's Document Requests*:

1. We object generally to your requests to the extent they appear to seek documents consulted by or generated by Mr. Thatch in the course of his search for actual business documents responsive to HIPA's document requests. Aetna (as was HIPA) was required to produce an Affidavit explaining why certain requested documents were or could not be produced. Aetna produced the requested Affidavit. Your request now for the documents consulted and generated by Aetna in the course of looking for the business records requested by HIPA is nothing more than pure harassment. As Mr. Thatch repeatedly testified under oath, you have been provided all documents responsive to HIPA's document requests which have been located by Aetna. (*See, e.g.*, Thatch Deposition, 316:1-317:1).

2. We object generally to your requests to the extent they seek documents "which relate to N.J. IPA's such as HIPA." This request evidences your complete disregard of Judge Politan's ruling during the March 14, 2002 conference that Aetna is not required to produce documents relating to IPA's other than HIPA. Consequently, Aetna is not required to produce any documents that relate to IPA's other than HIPA or that do not relate to documents that are relevant to this litigation.

3. We object generally to your continued assault on the adequacy of Aetna's document search. The assault is completely without foundation as the record is completely devoid of any evidence that Aetna engaged in misconduct, and or otherwise destroyed any documents responsive to HIPA's document requests. Indeed, Aetna has produced approximately 20,000 pages of documents. Moreover, we strongly disagree with your assertion that there are still "missing" documents. During his deposition, Mr. Thatch confirmed under oath over and over and over again, that he looked everywhere he reasonably believed relevant documents could be found and turned over everything that was found. "We looked for every single piece of information that had the name HIPA on it, not only HIPA but capitation, IPA anything New Jersey, anything that possibly could be related in any way, shape or form to this case . . . and we produced it." (Thatch Deposition 316:1-11). He continued: "I said we looked for anything, whether it was the name HIPA or other names such as capitation. I'm using examples, anything. We went through boxes and boxes and anything that remotely could have had anything to do with any type of backup information or any type of source information, we reviewed and produced." (*Id.* at 316:20-317:1); "So we went through this whole exercise going through discovery phase and we pulled, as I said before, you know, we looked under every crack in the office and in the archives." (*Id.* at 326:25-327:3); "Again, as we've been going through the discovery phase, I

was very clear that, you know, we [have] got to find every piece of information possible [sic] related to this case." (*Id.* at 330:5-8). There simply are no more documents and the continued attack on Mr. Thatch and Aetna and their efforts to identify and turn over responsive documents is without any basis in fact, is pure harassment, and constitutes a fishing expedition in the extreme.

B. *Aetna's Specific Objections To HIPA's Document Requests*:

Our specific objections are as follows and are set forth in the same numbered order as your enumerated paragraphs:

1. Your request for "Document Destruction Reports" and/or "Document Destruction Lists" is overly broad, unduly burdensome and simply intended to harass Aetna. The mere fact that Aetna and/or its off-site storage facilities may keep some type of records identifying documents to be destroyed does not give HIPA the right to explore every such index or record. Nor is there any basis on which to impose such a burdensome obligation on Aetna. Indeed, Aetna is an international corporation and only a minute fraction of the documents being stored in Aetna's off-site storage facilities related to New Jersey, let alone HIPA. You are permitted to, and you did, ask Mr. Thatch about all of his efforts to locate responsive documents. Moreover, Mr. Thatch's Affidavit details the exhaustive efforts made by him in that regard. Both his Affidavit and deposition testimony confirm that Aetna turned over every stone to find responsive documents and produced *all* responsive documents that were found. As Mr. Thatch testified, his search for responsive documents included multiple searches of all of Aetna's document storage accounts with Iron Mountain. Those searches were conducted using a database that included all documents that have been stored with Iron Mountain. Moreover, that database identified destruction dates for all boxes of documents that had been stored with Iron Mountain. As Mr. Thatch has testified, all of the boxes

of documents that had been identified as possibly containing responsive documents have been searched. Mr. Thatch explained that he used "key word" searches of every conceivable iteration in his search of the database, e.g., withhold, capitation, HIPA, IBNR and utilization. (Thatch Deposition 106:21-107:14, 114:19-117:22; Thatch Affidavit ¶¶ 10-20). Mr. Thatch testified that all responsive documents have been produced. Most importantly Mr. Thatch testified that he has not "come across anyone [he] would suspect of throwing things out that they shouldn't have." (Thatch Deposition 317:7-10). Indeed, Mr. Thatch testified that he "didn't find any evidence of anything related to this case that would have been destroyed." (Thatch Deposition 324:25-326:3; "I don't have any recollection of ever having anyone saying to me that boxes relating to HIPA were destroyed." *Id.* at 328:25-329:2). Mr. Thatch did not undertake to gather and review any "destruction reports" and/or "destruction lists" as those reports would provide no more information than Mr. Thatch was able to obtain through his database searches. For this reason, in addition to the general objections, we object to producing the requested documents.

2. Your request for correspondence, memos, e-mails, etc. from December 1997 through the present between Aetna and any document storage facility that may have stored Aetna/US Healthcare documents is overly broad, unduly burdensome and intended to harass Aetna. Again, as Mr. Thatch repeatedly testified, you have been provided all responsive documents that Aetna has located. Mr. Thatch's search for responsive business documents was done via his database searches. His search was more than reasonable and thus, Aetna has fulfilled its discovery obligations. That the facts have not come out as HIPA would have liked is no basis on which to continue this fishing expedition into the nature and extent of Aetna's document search and production. Thus, for this reason and the reasons set forth in our general objections, Aetna objects to producing the requested documents.

3. Your request for storage indices generated by either Aetna or any document storage facilities (on-site or off-site), that have stored Aetna/U.S. Healthcare records since 1990 is overly broad and unduly burdensome. The mere fact that Aetna and/or its off-site storage facilities may keep indices of stored documents does not give HIPA the right to explore every such index or record. Nor is there any basis on which to impose such a burdensome requirement on Aetna. Indeed, Aetna is an international corporation and only a minute fraction of the documents being stored in Aetna's off-site storage facilities related to New Jersey, let alone HIPA. In further response to this request, Aetna repeats and incorporates its response to request no. 1 in full.

4. Your request for "related correspondence" identified in the Aetna document retention polices that were produced is intended to harass Aetna. The record is currently devoid of any suggestion that any responsive documents have been destroyed by Aetna in any way, be it pursuant to a document retention policy or otherwise. In the absence of such a foundation, your continued fishing expedition into Aetna's document retention policies is objectionable. Accordingly, these documents will not be produced.

5. Your request for an e-mail that was circulated by Aetna's General Counsel concerning various class actions pending across the country, is a further attempt to harass Aetna. As Mr. Thatch explained, this email relates to a document retention policy pertaining to documents that may be relevant in a series of class action lawsuits unrelated to this action. Aetna will not produce this document.

II. *Aetna Did Not Improperly Redact Documents*

The membership reports produced by Aetna were properly redacted to protect against the dissemination of Aetna's confidential and proprietary information that is not relevant to this matter. First, membership counts of other IPA's in New Jersey

were appropriately redacted. Judge Politan previously ruled during the March 14, 2002 conference that documents relating to other IPA's are not relevant to this litigation and Aetna is not required to produce any documents relating to any WA other than HIPA. Consequently, those redactions are proper.

Second, the "Other" column on Exhibit H-16 and other similar documents is also properly redacted. The "Other" column refers to members in New Jersey that did not belong to any of the enumerated New Jersey IPAs. The "Other" columns includes "unassigned" members statewide, not just Mercer County. HIPA has not claimed that it is entitled to compensation for unassigned members outside of Mercer County. The total unassigned members in the State of New Jersey has no relevance to or bearing on the number of unassigned members in Mercer County. Indeed, even if this column were not redacted, HIPA would not be able to calculate the number of unassigned members in Mercer County. Accordingly, this column is appropriately redacted.

Finally, with regard to the number of "unassigned" members in Mercer County, Aetna went to great lengths to provide to HIPA two very large subscriber runs for 1993 and 1994. Those subscriber runs identified every subscriber in Mercer County, each subscriber's IPA affiliation, and the percentage of "unassigned" subscribers in Mercer County. Those subscriber runs were generated at the request of HIPA. The good faith accommodation by Aetna to generate those subscriber runs required an enormous effort and time commitment from a variety of Aetna employees. It was understood at that time that these subscriber runs were responsive to HIPA's request for "unassigned" member lists. Your request at this time for the production of unredacted documents that are not even responsive to HIPA's discovery requests undermines the previous understanding between the parties which led to the generation of those subscriber runs in the first instance and serves only to harass Aetna.

III. *Risk Pool Reconciliations and Capitation Summaries*

Your accusation that Aetna is intentionally withholding risk pool reconciliations and capitation summaries is without basis. To date, there has been no testimony that the documents you seek ever existed. Further, you have extensively questioned Mr. Thatch about all of his efforts to locate responsive documents and Aetna's document retention policies. Your allegation that Aetna is intentionally withholding documents ignores Mr. Thatch's testimony and Affidavit and serves no purpose but to embroil the parties in yet another prolonged discovery dispute that will delay the resolution of this matter.

Aside from the fact that Aetna is not withholding any documents from HIPA, if such documents did exist, the failure of Aetna to locate or produce such documents lies squarely with HIPA. HIPA's claims date as far back as October 1990. Since that time, Aetna has undergone various corporate and location changes. Yet, HIPA did not serve its Demand for Arbitration until the summer of 2000. Notwithstanding the delinquency in HIPA's claims and the corporate changes, Aetna has undergone extensive searches for documents, at a significant expense, and has made a voluminous production to HIPA of responsive documents.

Finally, if HIPA is in possession of any information establishing that risk pool and capitation summaries for the requested dates existed and are currently in Aetna's possession, please provide that information to us immediately. Indeed, is our belief, as set forth below, that it is HIPA who has been significantly holding back on other critical documents and information.

IV. *HIPA's Failure To Produce Documents*

In further response to your letters dated June 20 and 26, 2003 and our conversation on June 26, 2003, HIPA has failed to produce at least two categories of documents: (1) missing

HIPA meeting minutes; and (2) missing documents relating to the "QA and Utilization Committee." The representations contained in your June 20 and 26, 2003 letters relating to the existence of the missing HIPA meeting minutes and documents relating to the QA and Utilization Committee are contrary to the other documents HIPA has produced in this matter. First, HIPA's meeting minutes clearly evidence that the QA and Utilization Committee had meetings in which it discussed utilization reports. (HIPA 000256). Any minutes relating to this committee should be immediately produced, along with all of the utilization reports that were being considered by the committee. Further, the QA and Utilization Committee drafted reports and submitted such reports to HIPA during their meetings which were reviewed and filed by HIPA. (HIPA 000265). Consequently, we cannot accept your representation that HIPA "never had any documents regarding this committee."

Second, the HIPA meeting minutes also clearly evidence that HIPA routinely met on a monthly basis and that meeting minutes were taken at each meeting. Indeed, the meeting minutes themselves identify: (1) the date of the previous meeting; (2) the date of the meeting for which the minutes are referring; and (3) the date the next meeting is to be held. Further, the meeting minutes clearly evidence HIPA meetings were held and minutes were taken during the periods in which HIPA has failed to produce minutes. For example, the minutes from the May 25, 1994 meeting state "[t]he minutes of the 04-27-94 board meeting were discussed and approved as submitted." However, the April 27, 1994 minutes were not produced. Consequently, HIPA's representation contained in your letter that "no such documents ever existed" and the representation that the minutes were not produced because '[t]here were apparently numerous months between 1990 and 1997 where meetings never took place or were postponed" is belied by HIPA's own documents.

Finally, HIPA has failed to produce other categories of documents relating to capitation, utilization and withhold. While HIPA has steadfastly maintained that it was not provided utilization or capitation reports from Atena, HIPA's meeting minutes evidence that HIPA did routinely receive such documents. (HIPA 000263) ("Dr. Caskey informed that he has received the details of the with hold"); (HIPA 000238) ("Dr. Brenna gave two utilization reports"). Aetna has searched for and produced all of the responsive documents it has found. It also produced an Affidavit relating to the search and production. HIPA must similarly search for and produce such documents or provide an Affidavit stating why such documents could not be produced.

V. *HIPA's Affidavit Requirement*

Given your baseless position that Atena is intentionally withholding documents, and your previous position that Aetna must produce a detailed Affidavit on all efforts to locate responsive documents and Atena's document retention policies, we insist that HIPA provide a similar Affidavit. In your June 20, 2003 letter you state that with regard to the missing meeting minutes "no documents ever existed." You further state that HIPA "never had any documents" relating to the QA and Utilization Committee." The representations contained in your June 20, 2003 letter do not obviate against the requirement that, pursuant to Judge Politan's prior Orders, HIPA provide an Affidavit detailing all efforts to locate responsive documents and well as HIPA's document retention policies. Further, as explained in more detail, above, your client's representations appear to be erroneous.

In your first letter forwarded to my attention on June 26, 2003, you claim that HIPA need not provide an Affidavit because the documents Atena requested from HIPA "never existed." You concluded that because the failure to produce the documents was not related to a document retention policy, Judge Politan's Order requiring an Affidavit is inapplicable.

Given the fact that such documents clearly did exist, HIPA must not provide such an Affidavit.

Thereafter, in your second letter dated June 26, 2003 you assert that the Affidavit requirement does not apply to documents relating to HIPA's minutes or the QA and Utilization Committee. Your position is clearly against the spirit and intent of Judge Politan's previous discovery Orders. Indeed, you certainly did not apply Judge Politan's Order requiring an Affidavit in such a narrow way when you were insisting that Aetna provide such an Affidavit. If your position is that the Affidavit requirement only applies to those specific categories of documents that were identified as of the time of the conference with Judge Politan wherein he imposed that requirement, we will take this issue to Judge Politan for his consideration.

VI. *HIPA's Unconscionable Delays*

It is HIPA, not Aetna, that for more than a year delayed this case from progressing towards resolution due to frivolous and redundant motion practice and the failure to produce documents. For example, on April 18, 2002, after extensive briefing of the issue by both parties, Judge Politan Ordered HIPA member physicians to produce lost income documents. Despite Judge Politan's April 18, 2002 Order, HIPA steadfastly refused to produce lost income documents and repeatedly attempted to re-raise Judge Politan's decision on that matter in the hopes that he would change his mind. After a year of repeated motion practice on the discoverability of the lost income documents in which Judge Politan consistently ordered HIPA member physicians to produce responsive documents, and only after it became apparent that HIPA member physicians were not going to comply with Judge Politan's Orders and that Judge Politan was going to dismiss the lost income claims, did HIPA drop its lost income claims in March 2003, Consequently, as HIPA has caused this matter to be at a stand-still for most of the last year and a half, HIPA

has little standing to complain that this matter has been "unnecessarily delayed" or that Aetna has attempted to "impede discovery."

Very truly yours,

Tricia B. O'Reilly
TRICIA B. O'REILLY

MWT

EXHIBIT K

IN THE MATTER OF:

HEALTHPATH OF MERCER COUNTY, INC.,
Claimant,

v.

AETNA-U.S. HEALTHCARE, INC., AND
AETNA HEALTH PLANS OF NEW JERSEY, INC.,
Respondent.

Connell Foley LLP
85 Livingston Avenue
Roseland, New Jersey
Wednesday, September 3, 2003
2:15 p.m.

BEFORE:

Hon. Nicholas H. Politan, Arbitrator

[2] APPEARANCES:

SAIBER, SCHLESINGER, SATZ & GOLDSTEIN, LLC
One Gateway Center, 13th Floor
Newark, New Jersey 07102-5311
BY: MARC C. SINGER, ESQ.
and ANTHONY DEL GUERCIO, ESQ.
Attorneys for the Claimant

CONNELL FOLEY, LLP
85 Livingston Avenue
Roseland. New Jersey 07068
BY: MICHAEL X. McBRIDE, ESQ.
and TRICIA BEVELOCK O'REILLY, ESQ.
and MITCHELL W. TARASChi, ESQ.
Attorneys for the Respondent

[3] THE COURT: I read all your papers and they are wonderful. You should file them in a law school class that deals in discovery, which is good, its fine.

Nothing wrong with the papers, but I really want to get down to what I call the two affidavits which were submitted and work off of those affidavits.

Both of you criticize—each side criticizes the other's affidavits in terms of document discovery, and it would seem to me it would be helpful to me, because frankly, I'm about ready to say a pox on everybody's house, but I don't want to do that, because I don't want to shortcut any avenues of discovery either side has in this matter.

But I got Dr. Caskey's affidavit here, and is it Thatch?

MR. TARASCHI: Thatch.

THE COURT: I have that here too, and I pulled them out. I guess since you are the movant, Mr. Singer, you should go first. And I'd like you to critique, if you would, the affidavit that was submitted to you by Aetna.

MS. O'REILLY: It's Exhibit C.

MR. SINGER: Exhibit C to my papers [4] which should be this binder here.

THE COURT: I thought I pulled it out. Maybe I didn't. I know I pulled these out.

Let me just give you my commentary. Then you can take it from there.

MR. SINGER: That's fine.

THE COURT: One thing I think is obvious, and it can't be disputed, is that the retention policies were not in his hands before he was deposed; the night before he got them.

MR. SINGER: That's right, the second time.

* * * *

MS. O'REILLY: Right.

THE COURT: I'm not satisfied—at least at this point I'm not satisfied that we have adequately traced it. That's why I suggested to Mr. Singer that why don't you propound an Interrogatory which sets forth exactly what you are looking for by way of a record, who was in charge of the record when it was created, who was in charge of it after that person left or what have you, and that way you can satisfy yourself—both of you can satisfy yourselves as to these missing documents. There's missing documents on both sides. I'm not suggesting anybody spohated them or destroyed them, [16] but where are they?

MS. O'REILLY: Mr. Thatch has noticed several depositions, a couple from Cindy Major.

MR. SINGER: You said "Mr. Thatch."

THE COURT: You don't look like Thatch to me.

MR. SINGER: No.

MS. O'REILLY: Of the people that were in the operation business unit at the time, and we have told him that we would—some are former employees. We will produce them. These are people who these questions may be able to be directed to.

THE COURT: Do you want to do those depositions—

MR. SINGER: I am going to have to anyway, because they are going to be fact witnesses nonetheless. We can certainly broach that with them. I have no problem with that.

THE COURT: I think what you should do, Ms. O'Reilly, I think you should prepare those witnesses for exactly what we are talking about in this, and if they have knowledge, they should be prepared to respond to it. And if they know where these documents are, get them and bring them to the deposition.

[17] All we are trying to do is gather—you know, same instruction is going to apply on your side of things. With all due respect to the doctor, his affidavit is—lacks a little bit, if I might characterize. You know, he makes some general statements, and I'm sure he's in good faith. I don't mean he's not in good faith, but there are things that are missing. This organization sort of went puff. And there's this mixed company.

MR. SINGER: Mix was an administrator that came on the scene. There's a difference between HIPA and Aetna, obviously, in many regards.

THE COURT: Aetna is much bigger.

MR. SINGER: Much bigger, much more sophisticated, I'll submit, and had much more sophisticated document retention policies and procedures and methods for dealing with documents. You are talking about comparing essentially—I use the phrase loosely—but almost a mom-and-pop-type operation to almost a large national corporation.

THE COURT: Little league compared to the major league.

MR. SINGER: Exactly.

THE COURT: I hear you. Frankly, people in the smaller operation are better than the big ones [18] because its CYA all the way up the line. It's like the Army.

MR. SINGER: An important distinction is Aetna was, in the course of the contract, was there to provide certain administrative assistance which included maintaining, storing, creating documents that related to the operation of this venture, so to speak. So to say, well, why don't—why doesn't HIPA have certain documents that we submit were in the possession and were required to be in the possession of Aetna, you know, is a little unfair.

THE COURT: Except they don't have them either.

MR. SINGER: I understand.

THE COURT: So what I'm trying to do, I'm on the search for the truth, which is where are the documents or how can we get the documents so that when you argue your case, you get the benefit or detriment of it, and when she argues her case, the benefit or detriment of it.

MR. SINGER: I guess also one of the fundamental issues we have is why did we have to go through two attempts at this instead of addressing this up front? We noticed the deposition. They agreed to it. They said we were entitled to it.

[19] We go ahead, we go through the preparation—I mean, it's costly. And it was unnecessary. If they had an issue saying we either object to it or we believe the scope is too broad, whatever the issue was, it should have been raised at the outset, not after we've spent all the money and time involved in preparing not once, but twice to do this. And that's part of why we made the application—

THE COURT: Can I tell you, I don't think they know the answer. I got a feeling I don't think they know the answer.

MS. O'REILLY: If I may be heard.

Mr. Thatch was deposed at length as a fact witness and on his affidavit. A minor part of the deposition was this document retention policy, and when we read the deposition notice, we certainly assumed that it meant the search and retention and policies related to the HIPA documents. And Mr. Thatch was the individual who had that knowledge.

So to suggest that there was preparation for two full days of testimony on a deposition notice that had four or five categories of which Mr. Thatch gave full testimony is just not a fair characterization of what that deposition was all [20] about.

MR. SINGER: I respectfully disagree. I think the papers set forth pretty clearly the testimony that we elicited from Mr.

Thatch with regard to the document retention policies, which in essence was: "I know they exist, but I don't know what they are." And then day two, "Yeah, here, I got these yesterday."

THE COURT: Do you have them all now?

MR. SINGER: I don't know. I don't think so. There are e-mails Mr. Thatch has referenced that specifically state—or at least according to Mr. Thatch those e-mails specifically relate to e-mails sent by in-house counsel, other representatives at Aetna to various departments within Aetna to say, "make sure you hold on to all documents." I don't know what they say, but I know according to Mr. Thatch, they talk about document retention that specifically relate to documents that quite possibly and probably relate to issues in our case.

And if you look at the document retention policies that they did produce, when you look in there, there are references to numerous documents that have not been produced. And there are [21] references in those documents in particular to a court—I'm not sure which one, but there is a reference to a court specifically saying you must, Aetna, hold on to all documents created on or after January 1, 1994.

I don't know what the scope of that is. I don't know if it has to do with the issues in this case, but I tend to think that there are documents that they were required to hold on to that, quite frankly, relate to this case.

THE COURT: How would you—how do you find them?

MR. SINGER: We'd like to see what those e-mails and the correspondence and memos, et cetera, say.

THE COURT: They were supposed to be produced before the deposition?

MR. SINGER: In anticipation of the deposition.

MS. O'REILLY: It's an e-mail that relates to a different piece of litigation. We can present it to Your Honor for an in-camera inspection. It's our perspective it's irrelevant. It still doesn't go to how are we going to find these documents that we all agree we'd all like to have.

[22] THE COURT: How do we determine documents which allegedly existed which no longer exist?

MR. SINGER: Judge, I can point you—

THE COURT: The e-mail I'll look at anytime you want. I'll look at it now.

MR. SINGER: If I can point to one exhibit, it's Exhibit P in our submission.

THE COURT: Got it.

MR. SINGER: Turn to document Bates stamped R18867, which is towards the end, and it's labeled "Attachment E" at the top.

THE COURT: Yes.

MR. SINGER: I don't know if this is the e-mail or this is a reference to it or what, but you'll see that this does not—

MR. McBRIDE: Is there a date on it?

MR. SINGER: There is no date on it. Exhibit P says on the front page, page 18821, effective date, December 15, 2000. So I'm assuming it's contemporaneous or some—

MR. McBRIDE: This is not the 1994 document you are referring to?

MR. SINGER: I don't know what '94 document—

[23] MR. McBRIDE: This isn't this?

MR. SINGER: No. The '94 document is a document that said that the judge ordered all documents from '94 to be kept, but that document also, I believe, was either '99 or 2000, and I can find that one as well.

But the point that I want to make from this Attachment E in Exhibit P is that this—if you read this, it's not limited to class actions. It references class actions pending, but it's much broader as to the scope of what needs to be retained.

And if you look down to the bottom of that first page, "Categories of documents that you are required to maintain may include, but are not limited to, the following: Advertising, promotional, marketing disclosure materials, documents related to capitated and risk arrangements including IPA, IDS and mental health substance abuse contracts and related documents."

Right there there's a reference to IPA contracts. There's no reference to HIPA, but it's certainly not limited or excluded—it certainly doesn't exclude HIPA from that. It certainly doesn't say it's only as to class action between Aetna and Drs. A, B and C.

[24] MR. McBRIDE: What's the point?

MR. SINGER: The point is that we are entitled to know, we asked for it, there was never once any objection to our request for these documents, and it's relevant, and it could lead to the discovery of relevant evidence in this case, or admissible evidence; that we believe that there are documents out there that have not been produced, and it may be because they were destroyed.

THE COURT: All I want to know is how we find them. I'm not suggesting and I started out by saying I want to try to find them. Now, this policy obviously was as a result of a number of class actions. Being familiar with this kind of thing, I know that judges enter orders because all of the scullduggery of the recent times. But even in 1990, you

would issue an order like this to make sure records are not destroyed, e-mails are not erased and what have you.

The point that I make is, as you point out, this company is gigantic. It is not a little company. Now, unless they can categorize—unless somebody categorized or put in there that this relates to HIPA, I mean how—I don't think it's a fair burden to say go through a warehouse full of [25] documents which relate to capitation or things of that nature and see if there are any HIPA documents in there. It would seem to me if they are not indexed some way or another, how do you get to it?

MR. SINGER: I guess also that that kind of gets back to the initial reason why we noticed the depositions; to understand how this whole thing worked, how were these documents categorized. How do you know?

THE COURT: Who is the person at your company that knows this? I mean, Mr. Thatch is the person—let me tell you what I think Mr. Thatch is. Mr. Thatch is the person who was most intimately involved with the facts of this case, most intimately involved in the document discovery aspects of this case. There's no question about that. Nobody disputes that. They don't even dispute that.

The question now is, notwithstanding his good efforts, who in the company, if anybody—because I'm shooting in the dark too—has charge of all of this document retention and cataloging or categorizing or keeping records of what documents are where? I mean, you just don't—I'm sure you don't throw records into a warehouse and say, okay, that's 1992, or that's January 1992 There's got to be some

* * * *